

MEMORANDUM

Department of the City Attorney-Confidential/Privileged



To: Planning Commission

From: Kathleen Faubion

Subject: Background Information for Presentation to Planning Commission on RLUIPA

Date: June 18, 2004

The Planning Commission has requested information on RLUIPA and its relation to land use approvals by cities. This memorandum provides a brief summary of the statute, recent local caselaw, and related legislation being considered by the state Legislature.

The Statute. In 2000, Congress adopted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA", Pub.L. 106-274; 42 USC §2000cc). This act was the successor to acts which attempted to prevent governmental actions that substantially burdened a person's exercise of religion. The prior acts generally suffered constitutional infirmities related to their broad application to governmental actions. By contrast, RLUIPA focuses specifically on land use regulations, pre-empting regulations that burden religious use of property.¹ RLUIPA provides in relevant part:

"2000cc. Protection of land use as religious exercise.

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution—

(A) Is in furtherance of a compelling governmental interest; and

(B) Is the least restrictive means of furthering that compelling interest...

(2) Scope of application

This subsection applies in any case in which--

(C) The substantial burden is imposed in the implementation of a land use regulation or a system of land use regulations, under which a government makes, or has in place formal

¹ RLUIPA also applies to the religious practices of institutionalized persons. This aspect of the Act will not be discussed in this memorandum since it is not relevant to the Planning Commission's land use authority.

or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusion and terms

No government shall impose or implement a land use regulation that –

(A) Totally excludes religious assemblies from a jurisdiction; or

(B) Unreasonably limits religious assemblies, institutions or structures within a jurisdiction...”

RLUIPA thus prohibits local land use actions from imposing substantial burdens on religious exercise unless there is a compelling governmental interest and the burden is the least restrictive means of accomplishing the governmental interest. While local government has many interests which it seeks to promote, relatively few are considered “compelling.” For example, in *Cottonwood Christian Center v. Cypress Redevelopment Agency* (C.Dist. Cal., 2002) 218 F.Supp.2d 1203, a property owner challenged various land use actions by a city, including denial of a conditional use permit. Among the city’s justifications for denial was that it needed to generate revenue and that a church use would not serve the purposes of its redevelopment plan in that respect. The federal district court found that this was not a “compelling” interest, noting that “...revenue generation is not the type of activity that is needed to ‘protect the public health or safety’...” The court observed that,

“Cottonwood is, as are most churches, a tax-exempt non-profit group. If revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities...” (Id. at 1228.)

Further, even if a particular state interest is determined to be compelling, the second half of this first test requires that the means selected to promote the compelling interest be no more restrictive than is necessary. A restriction will be invalid if there is any other method of promoting it which would not restrict the religious activity or would restrict it to a lesser extent.

Current Caselaw.

A number of district courts (i.e., federal trial courts) have issued RLUIPA rulings, and some federal appellate cases have begun to appear. Given its First Amendment implications and pre-emptive effect, it is likely that a RLUIPA land use case may ultimately find its way to the U.S. Supreme Court. In the

meantime, the Ninth Circuit recently addressed RLUIPA in a local land use case out of Morgan Hill. (*San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (2004).)

In *Morgan Hill*, the college requested the city to rezone the St. Louise Hospital site to allow an educational facility. The city denied the rezoning when the applicant advertised its plans to expand the facility some three-fold in the future, but did not provide the city with requested information on the expansion, including information that would have been used for the project CEQA review. After extensive analysis, the court determined that the city's denial of the rezoning did not deprive the college of its First Amendment right to the free exercise of religion. The court then continued its analysis to address the RLUIPA claims, noting that the college has the burden to show that the city's zoning laws, or their application of the laws, substantially burdened the college's exercise of religion. (Id. at 1034.) Interpreting the term "substantial burden", the court described RLUIPA as follows.

...the government is prohibited from imposing or implementing a land use regulation in a manner that imposes a "significantly great" restriction or onus on "any exercise of religion, whether or not compelled by, or central to a system of religious belief" of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly, or institution is: (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that compelling governmental interest. (Id. at 1035.)

Applying this rule to the facts of the situation, the court determined that the "City's ordinance imposes no restriction whatsoever on College's religious experience; it merely requires College to submit a *complete* application, as is required of all applicants." (Id. at 1035.) Observing that there is no evidence the city would not impose the same requirements on any application to rezone the site, the court found no violation of RLUIPA. Using the same reasoning, the court also ruled against college's claim that CEQA review substantially burdened the college's free exercise of religion. (Id. at 1036.) The Morgan Hill case involved application review procedures, which are generally fairly standardized. It may be a more difficult decision when the court is faced with reviewing a local agency decision on the merits of an application. Nevertheless, the case shows the importance of generally applicable provisions that apply across the board, and not specifically to religious institutions. This is consistent with our past advice to the City.

Pending State Legislation.

The California Legislature is considering AB 1903, a bill that would establish RLUIPA-type regulation for the state. A summary of the status of AB 1903 is attached as Exhibit A. The bill would add a new section 65008.7 to the Government Code, in the Planning and Zoning Law, as follows.

65008.7. Any action pursuant to this title by any city, county, city and county, or other local governmental agency that affects religious institutions and assemblies, or religious uses of private residences, shall use standards that are no less favorable than the standards used by that agency for actions that affect nonreligious institutions and assemblies, including, but not limited to, assembly halls, lodges, nightclubs, restaurants, and theaters, and nonreligious uses of private residences.

While the bill has been amended since its introduction, and may still be amended further, its current text provides useful guidance to local land use decision makers. Consistent with our advice to the Commission in the past, the statute generally requires that religious uses be treated as other assembly uses would be treated in a land use context.

I hope this general information is useful to the Planning Commission as background to our presentation and the discussion at the upcoming meeting.

c: James Lindsay, Planning
Steven T. Mattas, City Attorney

EXHIBIT A – STATUS OF AB 1903

BILL NUMBER: AB 1903 AMENDED
BILL TEXT

AMENDED IN SENATE JUNE 8, 2004
AMENDED IN ASSEMBLY MAY 11, 2004
AMENDED IN ASSEMBLY APRIL 12, 2004

INTRODUCED BY Assembly Member Maddox

FEBRUARY 9, 2004

An act to add Section 65008.7 to the Government Code, relating to land use.

LEGISLATIVE COUNSEL'S DIGEST

AB 1903, as amended, Maddox. Discrimination: land use: religion.

Existing law, the Unruh Civil Rights Act, prohibits discrimination in business establishments and housing on the basis of, among other things, religion. Existing law also prohibits local governments from denying individuals or groups the enjoyment of land use on that basis, as specified.

This bill would require **local** government ~~entities to make~~ **actions relative to** land use ~~decisions~~ affecting religious institutions and assemblies, ~~and~~ **or** religious uses of private residences, ~~using~~ **to use** no less favorable standards than those used for ~~making land use decisions~~ **actions** affecting nonreligious institutions and assemblies and nonreligious uses of private residences.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 65008.7 is added to the Government Code, to read:

~~65008.7. Government entities shall make land use decisions affecting religious institutions and assemblies, and religious uses of private residences, using no less favorable standards than those~~

~~used for making land use decisions affecting nonreligious institutions and assemblies, including, but not limited to, assembly halls, lodges, nightclubs, restaurants, and theaters, and nonreligious uses of private residences.~~

65008.7. Any action pursuant to this title by any city, county, city and county, or other local governmental agency that affects religious institutions and assemblies, or religious uses of private residences, shall use standards that are no less favorable than the standards used by that agency for actions that affect nonreligious institutions and assemblies, including, but not limited to, assembly halls, lodges, nightclubs, restaurants, and theaters, and nonreligious uses of private residences.